

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
1111 20th Street, N.W.  
Washington, D.C. 20036



Date: DECEMBER 4, 1992

In the Matters of:

<b>PERLA TATE, M.D., EMPLOYER</b> on behalf of RAMA CHERUKURI, Alien	<b>Case No. 90-INA-175</b>
<b>NISARUL HAQUE, M.D., EMPLOYER</b> on behalf of ALTAF JAN, Alien	<b>Case No. 90-INA-225</b>
<b>RAGHAVA RAO POLAVARAPU, M.D., EMPLOYER</b> on behalf of SUBOSE CHANDRA BOSE MANYAM, Alien	<b>Case No. 90-INA-275</b>
<b>RADHAKRISHNA MURTHY, M.D., P.C., EMPLOYER</b> on behalf of TARIGOPULA CHOUDARY, Alien	<b>Case No. 90-INA-331</b>
<b>SANDARENE MILLER, M.D., EMPLOYER</b> on behalf of KRISHNA RAJA KOLLA, Alien	<b>Case No. 90-INA-401</b>
<b>RAJIV PURI, M.D., EMPLOYER</b> on behalf of F.J. TIRUMALASETT, Alien	<b>Case No. 90-INA-583</b>
<b>HAMID LALANI, M.D., EMPLOYER</b> on behalf of AMIN A. CHARANIA, Alien	<b>Case No. 90-INA-592</b>
<b>INDIRA KAIRAM, M.D., EMPLOYER</b> on behalf of SURESH VADADA, Alien	<b>Case No. 90-INA-593</b>
<b>C.P. SCHOOLER, M.D., EMPLOYER</b> on behalf of SUBRAMANIAN SIVARAJAN, Alien	<b>Case No. 91-INA-4</b>
<b>SYED M.I. SHARIFF, M.D. &amp; ASSOCS., EMPLOYER</b> on behalf of DHUN SADRY, Alien	<b>Case No. 91-INA-5</b>
<b>MANZUR KHALID, M.D., EMPLOYER</b> on behalf of KRISHNAN SILARAM, Alien	<b>Case No. 91-INA-7</b>
<b>NIRANJAN K. MITTAL, M.D., EMPLOYER</b> on behalf of SHAMSUL K. BHUIYAN, Alien	<b>Case No. 91-INA-22</b>
<b>SARUHUL KHAN, M.D., EMPLOYER</b> on behalf of ALI AKBAR, Alien	<b>Case No. 91-INA-82</b>

**SHAMSUDDIN RANA, M.D.**  
**on behalf of NASIM SHEIKH, Alien**

**Case No. 91-INA-151**

**APPEARANCES:** Stephen Donald Jeffries, Esq.  
Neil Weinrib, Esq.  
For the Employers

Annaliese Impink, Esq.,  
Harry Sheinfeld, Esq.  
For the Certifying Officer

David Stanton, Esq.  
For the American Immigration Lawyers Association

**BEFORE:** Brenner, Clarke, De Gregorio, Glennon, Groner,  
Guill, Litt, Romano and Williams<sup>1</sup>  
Administrative Law Judges

LAWRENCE BRENNER  
Administrative Law Judge

### **DECISION AND ORDER**

This case arises from the employers' requests for review of the denials by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certifications. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

We base our decision on the record upon which the CO denied certification and the employers' requests for review, as contained in the appeal files ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

### **Procedural History**

By Notice and Order dated February 20, 1992, the Board of Alien Labor Certification Appeals ("Board") determined, sua sponte, that it would conduct en banc review of the above-named cases. The employers seek permanent labor certification for aliens to fill the positions of physician or, in the case of Perla Tate, M.D., to fill the position of physician's assistant.

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<sup>1</sup> Judges Glennon and Williams did not participate in the decision of these cases.

New York State law mandates that the alien physicians be licensed which, in turn, requires the completion of three years of approved residency training. In the appeal file of C.P. Schooler, M.D., excerpts from the New York State Department of Education's Medicine Handbook were submitted wherein the following is stated:

(b) For issuance of a license to practice medicine, graduates of medical education programs neither registered by the department nor accredited by an accrediting organization acceptable to the department shall meet the following requirements:

\* \* \*

(2) those individuals who make application for licensure on or after July 1, 1981, shall have completed at least three years of postgraduate training approved by the Accreditation Council on Graduate Medical Education or the American Osteopathic Association or their predecessors or successors.

AF. at 11. Likewise, in Perla Tate, M.D., documentation from the New York state job service evidences that a physician's assistant must obtain a license which requires the completion of an approved two year training program for physicians' assistants or the successful completion of a national certifying examination and these requirements are conceded by the employer. AF. at 8, 20-21. Training for the physicians and physician's assistant can only be accomplished, the employers argue, if the aliens are granted permanent labor certification.

Consequently, the Board invited briefs regarding the propriety of the CO's denials of labor certification on the following two grounds:

- (1) whether employment of the alien would violate Federal, State or local law in contravention of 20 C.F.R. § 656.20(c), where the alien did not yet possess a state license, or
- (2) whether the alien's employment would violate 20 C.F.R. § 656.21(g) on the theory that the regulation requires that the job be a current one, and not one that would come into existence at some future date.

Briefs were subsequently filed by Stephen Jeffries, counsel for six of the employers, on April 17, 1992, and by Neil Weinrib, counsel for the remaining eight employers, on April 22, 1992. Moreover, as required by the February 20, 1992 Notice and Order, notices of Intent to Proceed were filed on behalf of the employers by Jeffries on March 9, 1992 and by Weinrib on March 4, 1992. Annaliese Impink, counsel for the Solicitor, filed a brief on behalf of the CO dated April 20, 1992.

At the requests of Weinrib and Jeffries, the Board granted leave for the parties to file supplemental briefs by Order dated July 28, 1992. Jeffries filed a supplemental brief on August

26, 1992 and briefs were received from the Solicitor on August 17, 1992 and from the American Immigration Lawyers Association ("AILA"), as amicus curiae, on August 15, 1992.

Oral argument in these matters was scheduled by Order dated July 23, 1992, and was held in Washington, D.C. on September 9, 1992. Stephen Jeffries argued on behalf of the employers, Annaliese Impink argued on behalf of the CO, and David Stanton argued on behalf of AILA.

## **Discussion and Conclusions**

### **I**

The labor certification process has undergone a metamorphoses arising from competing political, economic, and socio-cultural forces. At the inception of the Act, brightline divisions of quotas defined the immigration system. The passage of time, however, brought change to the marketplace with the advent of Asian economic successes and the European Economic Community. As a result, perspectives shifted from the provincial to the global.

Congress first repealed the quota provisions in its 1965 amendments to the Act in favor of the preference system. The following was stated in the Senate Report to the 1965 amendments:

The committee feels that emphasis should be placed on the quality of the immigrants to be admitted, rather than on the number.

Senate Report No. 748, 89th Cong., 1st Sess., 1965 U.S.Code and Cong. and Admin.News at 3332. In its most recent revitalization of the Act in 1990, Congress reemphasized the quality of immigrants over their quantity in the face of global economic competition and a United States workforce waning in skills and abilities commensurate with the needs of today's employers. The following was noted in the House Report of the 1990 amendments to the Act:

The U.S. labor market is now faced with two problems that immigration policy can help to correct. The first is the need of American business for highly skilled, specially trained personnel to fill increasingly sophisticated jobs for which domestic personnel cannot be found and there is a need for other workers to meet specific labor shortages. The second problem concerns the increasing skills gap in the current and projected U.S. labor pool.

\* \* \*

Because it is unlikely that enough U.S. workers will be trained quickly enough to meet legitimate employment needs, and because such needs are already not being met, the Committee is convinced that immigration can and should be incorporated into an overall strategy that promotes the creation of the type of workforce needed in an increasingly competitive global economy without adversely impacting on the wages and working conditions of American workers.

House Report No. 101-723(I), 101st Cong., 2d Sess., 1990 U.S. Code and Cong. and Adm. News at 6720.

In weighing the interests of U.S. workers against the employer's need to fill an existing position through permanent labor certification, the regulation at 20 C.F.R. § 656.1(a), pursuant to the Act, carves an exception to the exclusion of aliens and provides the following:

(a) . . . certain aliens may not obtain a visa for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:

(1) There are not sufficient United States workers, who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and

(2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

20 C.F.R. § 656.1(a)(1) and (2).

## II

To ensure the minimal competency of physicians seeking permanent labor certification, the regulations at 20 C.F.R. § 656.20(d) require that the application establish that the alien: (1) has passed parts I and II of the National Board of Medical Examiners Examination or the Visa Qualifying Examination; or (2) was licensed and practicing medicine in the United States on January 9, 1977; or (3) is a graduate of a school of medicine accredited by the Secretary of Education. 20 C.F.R. § 656.20(d). The alien physicians in these cases satisfy the requirements at § 656.20(d) and the physician's assistant is not subject to its requirements. However, the CO also maintains that § 656.20(c)(7), which directs that "the job opportunity's terms, conditions and occupational environment are not contrary to Federal, State, or local law", imposes the New York State licensure requirement upon the alien physicians and physician's assistant in these cases and this requirement remains unsatisfied. 20 C.F.R. § 656.20(c)(7).

Initially, the employers argue that, with respect to the alien physicians, § 656.20(c)(7) is inapplicable as § 656.20(d) is independent of the other provisions at § 656.20 and an alien physician who satisfies its requirements should not face the further impediment of a state license in order to obtain permanent labor certification. The Solicitor, on the other hand, maintains that § 656.20(d) should not be read in a vacuum; rather, the alien physicians are required to satisfy § 656.20(d) in addition to establishing their compliance with the remaining provisions of Part 656. This view is supported by the introductory language at § 656.20(d) which states that "[i]f the application involves labor certification as a physician, the labor application shall include the following documentation" regarding the alien's minimal competency to practice medicine in the United States. 20 C.F.R. § 656.20(d) (emphasis added). The provisions at § 656.20(d) are

standardized requirements which apply to labor certification procedures for sixth preference physicians nationwide; they do not purport to encompass the permanent labor certification requirements for physicians in their entirety. Thus, we conclude that § 656.20(c)(7) is applicable to these cases.

Moreover, the CO correctly concluded that the provisions at 20 C.F.R. § 656.20(c)(7) address the New York State licensure requirement for physicians and physician's assistant. Therefore, regardless of whether an employer's labor certification application form sets forth the licensure requirement, such a requirement may be imposed by a state law, as in these cases.

Notwithstanding imposition of the state licensing requirements through § 656.20(c)(7), the employers argue that their job descriptions are not contrary to state law in that the alien physicians will not practice medicine until they complete their residency training and obtain a license and, similarly, the physician's assistant will not perform the job offered until she is licensed. The Solicitor argues, on the other hand, that labor certification was properly denied under § 656.20(c)(7), as to hold otherwise would be tantamount to granting the aliens "a license to practice medicine in New York in contravention of state law."

We conclude that § 656.20(c)(7) is not violated. The terms of the jobs offered are not contrary to state law because, if labor certification is granted, the aliens simply will not work as physicians or as a physician's assistant upon their entry into the United States unless and until they complete the required training and obtain the state license. Therefore, they will not practice without a license in violation of state law. However, this argument by the employers, which we accept, gives rise to other problems regarding the currency of the jobs offered.

### III

We now turn to the following issues: (1) whether the regulations require that the job opportunity be "current" in the sense that the aliens be currently available to fill the positions; and (2) if so, whether the positions at issue here are "current." The CO denied labor certification in many of the cases under § 656.20(c)(4) which provides that an employer must document that it "will be able to place the alien on the payroll on or before the date of the alien's proposed entrance into the United States." 20 C.F.R. § 656.20(c)(4). Initially, the Board notes that the issue is not whether a bona fide job opportunity exists; it is whether an existing position, for which the alien will be qualified and available some time after entry into the United States, qualifies for permanent labor certification. Thus, the decisions cited in the employers' and AILA's briefs regarding new positions arising from business expansion are inapplicable.

The employers argue that nowhere in Part 656 is a "current" alien availability required. They point to a backlog in processing visa applications to state that positions, for which labor certifications are granted, often remain vacant until an alien's visa is processed, which may take several years. It is disingenuous, the employers then assert, to require that the alien physicians or physician's assistant immediately be qualified, and therefore available, to fill the positions at issue where an alien is technically never able to immediately fill a position through permanent labor certification due to the administrative backlog in processing visas.

In light of this, the employers and AILA maintain that the provisions at § 656.20(c)(4) address the ability to pay rather than actual placement of the aliens on the employers' payrolls. Indeed, Weinrib urges that a valid "offer of employment" is the proper point of reference for determining whether a "current" job opportunity exists. The Solicitor, however, urges that the provisions at § 656.20(c)(4) demonstrate that the job opportunity must be "current" in the sense that the alien be placed on the employer's payroll for the job offered upon entry into the United States.

The language of § 656.20(c)(4), though not a model of clarity, must entail more than ability to pay. Otherwise, it would simply duplicate another regulation in the same section which specifically requires that the employer document that it "has enough funds available to pay the wage or salary offered the alien." 20 C.F.R. § 656.20(c)(1). The shift in focus from the quantity of immigrants to their quality under the Act is due, in part, to a desire that immigrants contribute to the United States economy and not become public charges. Section 1182(a)(4) of the Act provides, in pertinent part, that:

Any alien who . . . , in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely to become a public charge is excludable.

8 U.S.C. § 1182(a)(4). Consequently, the language of § 656.20(c)(4) is properly interpreted to mean that the job opportunity must be "current" in that the employer must place the alien on its payroll for the job offered upon his or her entry into the United States.

This conclusion is supported by the Technical Assistance Guide ("TAG"). Although the TAG is not binding upon the Board, it may be persuasive as a reasonable interpretation of the Act and its implementing regulations. Roger and Denny Phelps, 88-INA-214 (May 31, 1989) (en banc). The TAG provides that § 656.20(c)(4) is designed "to assure that the alien will have employment on arrival, and will not become a public charge." TAG No. 656 at 35 (1981). We find that this interpretation is consistent with the Act's intent.

The employers cite several Immigration and Naturalization Service ("INS") cases, Matter of Shah, 17-INS-244 (Aug. 26, 1977), Matter of Chu, 13-INS-122 (Jan. 20, 1969), Matter of Maher, 12-INS-680 (Mar. 20, 1968), Matter of Semerjian, 11-INS-751 (June 28, 1966), Matter of Stamatiades, 11-INS-643 (June 8, 1966), Matter of Naufahu, 11-INS-904 (Nov. 28, 1966), to argue that unlicensed aliens may nevertheless be approved for visas by the INS. The CO, on the other hand, maintains that the cases cited address the issue of whether an alien qualifies as a member of a profession as defined at 8 U.S.C. § 1153(a)(3)(A)(iii).

Determinations by the Board of Immigration Appeals of the INS may be persuasive, but they are not binding upon this Board. In the cases cited by the employers, the petitioners sought classification as a "member of the professions" under the third preference immigrant provisions at § 203(a)(3) of the Act. The analysis employed to determine whether an individual is a "member of the professions" is distinct from that necessary to discharge the Secretary of Labor's duties in certifying that there are no qualified U.S. workers willing, able, and available for the job and that

employment of the unlicensed alien will not adversely affect the wages and working conditions of U.S. workers. Thus, even if an alien establishes that he or she is a "member of the professions" for purposes of third preference classification, 8 C.F.R. § 204.2(i)(4) of the INS regulations provides that "[n]o third or sixth preference petition shall be approvable unless it is supported by a valid labor certification issued under section 212(a)(14) of the Act." The INS regulations further provide that such a determination under § 212(a)(14) is made by the Secretary of Labor under 20 C.F.R. Part 656. 8 C.F.R. § 204.2(i)(4).

Adequate testing of the labor market and the economic effects that employment of the unlicensed alien will have on the U.S. workplace are not considerations for purposes of determining whether the alien is a "member of the professions." Consequently, while INS does not appear to object to an unlicensed alien being considered a "member of the professions", our inquiry does not end here.

Because the regulation at 20 C.F.R. § 656.20(c)(4) speaks to placement of the alien on the employer's payroll on his or her date of entry into the United States, an administrative backlog in the processing of visas becomes irrelevant. In any event, such difficulties would not support a finding that the process should be compounded to accommodate the additional time where an alien physician may wait several years for a visa and then must complete a three-year residency program after entry into the United States or where an alien, who seeks to become a physician's assistant, must undergo two years of training or pass a national certifying examination prior to performing the job offered after entering the United States. See e.g. Azumano Travel Service, Inc., 90-INA-215 (Sept. 4, 1991).

Jeffries argues that the licensing problems presented here are analogous to those of every alien entering the United States in that, upon entry into the United States and before he or she commences employment, there is a time delay in completing forms for a green card, which is a "license to work". AILA likewise cautions the Board against finding a per se bar to labor certification where the alien does not possess a license needed to perform the job offered.

These arguments are well-taken. However, there is a clear distinction between the relatively short process involved in obtaining a green card and the substantial, three-year residency program which awaits the alien physicians here as well as the two year training program or national examination which the physician's assistant must successfully complete. In this vein, we hold that an alien's lack of a required license to perform the job offered upon entry into the United States is not a per se bar to obtaining labor certification; however, the employer must document that such a license is obtainable within a proximate time of the alien's entry into the United States through the completion of a ministerial process.

Under the facts of the cases at bar, the residency program for physicians is neither ministerial in nature nor is a three-year period proximate to the alien's entry into the United States. Likewise, the alien in Perla Tate, M.D. is not subjected to ministerial requirements for licensure; rather, she must successfully complete an approved two year training program or a national certifying examination. To grant labor certification in these cases would result in disparate treatment over U.S. workers who were not afforded the same grace period to become available and

qualified for the job offered. Indeed, a lengthy delay in obtaining the license creates a corresponding level of speculation regarding whether the alien will ever obtain it. More importantly, the alien enters the country jobless and either becomes a public charge or, in the case of a physician, competes with U.S. workers for employment with an institution, other than the petitioning employer, to perform the residency training. The physician's assistant must also undergo two years of training, prior to being employable as a physician's assistant, or pass a national certifying examination. The labor pool has not been tested for potential U.S. workers who are likewise qualified for a lesser skilled, unlicensed position in residency training or as an unlicensed physician's assistant/trainee. Moreover, U.S. citizens, such as medical students, have not been informed by the employers' recruitments that they could apply even if they, like the aliens, had years of medical training remaining prior to being able to obtain a license.

Even in cases such as Radhakrishna Murthy, M.D., where the employer delineated job duties to be performed before licensure, the position for which labor certification is sought remains that of a physician and the alien is neither qualified nor available for such a job. The regulations at § 656.20(c)(4), requiring that the alien be placed on the employer's payroll upon entry into the United States, contemplates that the alien be placed on the payroll to perform the job for which labor certification is granted. This interpretation is supported by § 656.30(c)(2) which provides that "[a] labor certification application involving a specific job offer is valid only for the particular job opportunity, the alien for whom labor certification was granted, and for the area of intended employment stated on the Application for Alien Labor Certification form." 20 C.F.R. § 656.30(c)(2). To hold otherwise would thwart the purpose of the permanent labor certification process which is to bring quality immigrants to the United States to fill positions for which there are insufficient U.S. workers who are qualified, willing, able, and available.

From this perspective, the employers' arguments that the Board is not empowered to review the alien's qualifications in the context of the permanent labor certification process are without merit. The Board often reviews an alien's qualifications to ensure that the job is offered at its minimum requirements and not offered under conditions more favorable to the alien than to U.S. workers. Indeed, the CO and, if in issue, the Board must review the qualifications of alien physicians for the special requirements at § 656.20(d) in these cases.

The core functions of the Secretary of Labor are to certify that there are no willing, qualified, able, and available U.S. workers for the job offered and that employment of the alien will not have an adverse impact on the wages and working conditions of U.S. workers. Under the Act, it is within the bailiwick of the Immigration and Naturalization Service to investigate the facts of a labor certification, including the alien's qualifications, to uncover any deficiencies in the application such as fraud or wilful misrepresentation. 8 U.S.C. § 1154. However, in performing her statutory functions, it is also relevant for the Secretary of Labor to assess the alien's qualifications to evaluate the effect that employment of the alien will have upon wages and working conditions of U.S. workers.

In Madany v. Smith, 696 F.2d 1008 (D.C.Cir.1983), the Circuit Court of Appeals for the District of Columbia held that, although a review of an alien's qualifications rests primarily with the INS:

[t]his does not mean that DOL cannot, or does not, undertake analysis of an alien's qualifications as it performs its statutory functions. Indeed, DOL may gauge the alien's skill level in evaluating the effect of the alien's employment on United States workers.

Id. at 1012. Although Madany involves the propriety of a third preference labor certification, it is useful here regarding sixth preference classifications as the Secretary of Labor's previously noted core functions remain the same. See also Joseph v. Landon, 679 F.2d 113, 116 (1982).

From the foregoing, we conclude that labor certification was properly denied pursuant to the provisions at 20 C.F.R. § 656.20(c)(4). Consequently, it is unnecessary for the Board to address the remaining issues presented in these cases.

### **ORDER**

IT IS ORDERED that the denials of labor certification in these cases are hereby **AFFIRMED**.

At Washington, D.C.

For the Board:

LAWRENCE BRENNER  
Administrative Law Judge

### **Judge Guill, concurring.**

I agree with the majority opinion but write separately to emphasize that this case is about qualifications. The aliens are simply not qualified for the jobs offered. Specifically, if an employer seeks certain qualifications which are approved as the minimal requirements for the job, those applicants without the qualifications are properly rejected.

Moreover, there is no analogy between the delay caused by a backlog due to administrative procedures and limited availability of visas and a delay in performing the jobs offered necessitated by a three-year residency program or a two year training program. The delay associated with the applications in question are the result of the aliens' lack of qualifications.

**Perla Tate, M.D., Case No. 90-INA-175, et al.**

**Judge David A. Clarke, Jr., concurring in part:**

These cases are not complex or difficult and the existing regulations and case law are clear.

Initially, it should be pointed out that this Board does not have jurisdiction to entertain these appeals. 20 CFR § 656.26 requires that the employer be a party to any appeal filed before

this Board. Since the petitioners are not the employers of these aliens, they have no standing to file these appeals and this Board has no jurisdiction to entertain these appeals.

There can be no question that the Act and regulations contemplate applications for alien labor certification from financially responsible employers who are prepared to give the aliens immediate jobs and salaries upon entry into this country.<sup>1</sup> The petitioners in these cases, who are seeking labor certification for the aliens, are not employers. They can not offer immediate employment to these aliens upon entry into this country because the aliens do not have the required medical licenses; and they are not offering to pay salaries (or wages) to these aliens while they complete the two to three years of training required by the State of New York to obtain medical licenses. 20 CFR § 656.20(c)(4), 656.50(4).

Because the aliens will not be working for petitioners upon entry into this country, we do not know who the real employers will be. We are told that the aliens will seek employment with hospitals or other institutions where they can train for two to three years and obtain medical licenses. If this is so, then these hospitals or institutions are the proper parties to petition for labor certification since they would be the real employers.

In addition, its speculative as to whether these aliens will find suitable employment in which to train, successfully complete the required years of training, obtain medical licenses and go to work for petitioners.<sup>2</sup> There is a very real possibility that their plans could go astray and they could become public charges.

Moreover, the denials should be sustained because petitioners did not advertise these jobs with the two to three year waiting periods being offered the aliens. Consequently, petitioners offered terms and conditions of employment to U.S. workers which were less favorable than those offered the aliens. 20 CFR § 656.21(g)(8); § 656.20(c)(8)

Accordingly, I would dismiss these appeals for lack of jurisdiction. In the alternative, I would affirm the denials of labor certification.

DAVID A. CLARKE, JR.,  
Administrative Law Judge

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<sup>1</sup> To interpret the Act otherwise would open the door to all sorts of mischief. e.g.: petitioners obtaining alien labor certification for non-existent jobs, future jobs, jobs offered by other employers at wages below the prevailing wages; difficulties of calculating prevailing wages for future jobs, determining availability of U.S. workers for future jobs, advertising, etc.

<sup>2</sup> It is equally speculative that these aliens would ever work in localities where there are shortages of physicians.

**Nahum Litt, concurring in part and dissenting in part.**

I concur with Part II of the majority's discussion. I dissent from Part III.

Twenty C.F.R. § 656.20(c)(4) requires that the application for alien employment certification clearly show that the "employer will be able to place the alien on the payroll on or before the date of the alien's proposed entrance into the United States[.]" The majority has held, in essence, that section 656.20(c)(4) is violated by the applications under consideration because the physician-employers cannot place the aliens on their payrolls when the aliens enter the United States because state law prohibits them from working as a physician in private practice until he or she has completed a three-year residency and obtained a medical license. This holding is based, in large part, on the premise that section 656.20(c)(4) has the purpose of preventing an alien who is likely to become a public charge from being granted alien labor certification.

Assuming that the Secretary of Labor can properly deny a labor certification on the ground that the alien might become a public charge,<sup>1</sup> due process requires that an employer be afforded the opportunity to establish that the alien would not be likely to become a public charge, such as by proof of the widespread availability of residency positions in New York state. Similarly, an employer could show (far-fetched as it may seem) that it is legal, and the employer is willing, to place an applicant on its payroll while the applicant works elsewhere performing a residency.<sup>2</sup>

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<sup>1</sup> To link the regulation to the likelihood of alien becoming a public charge, is to link it to a question that has nothing to do with the availability of qualified U.S. workers or with wages and working conditions of U.S. workers. The Act delegates the authority to decide whether to exclude an alien on this ground to the Attorney General. 8 U.S.C. § 1182(a)(4). In interpreting the meaning of labor certification regulations, the Secretary of Labor's function to certify that there not sufficient United States workers who are able, willing and qualified to perform the position offered, and that employment of the alien will not adversely affect wages and working conditions of United States workers similarly employed. 8 U.S.C. § 1182(a)(5)(A). The Secretary of Labor issues labor certifications, not visas.

Thus, I would not construe section 656.20(c)(4) as requiring that "the job opportunity be 'current,' in that the employer must place the alien on its payroll for the job offered upon his or her entry into the United States." Slip op. at 9. The majority is in error in stating that section 656.20(c)(4) must mean something more than the ability to pay because it would otherwise merely duplicate 656.20(c)(1). The sections speak to different aspects of an ability to pay. Section 656.20(c)(1) requires solvency. Section 656.20(c)(4), in my view, requires only that the employer clearly show that it has an operational payroll system—not that the employer actually put the alien on the payroll upon entry into the United States.

<sup>2</sup> This concern is especially cogent in those applications where the Certifying  
(continued...)

Another concern expressed by the majority is that the employers did not make known to United States applicants their willingness to provide a grace period to become available for the position. I agree with this concern, but point out that an employer could overcome the objection by advertising this aspect of the job offer.

Finally, the majority is concerned that the Department of Labor should not issue a labor certification for a position that could not be filled by the alien within a short period of entry into the United States, because to do so "would thwart the purpose of the permanent labor certification process." Slip op. at 12. I disagree. It is no secret that the United States suffers from a shortage of physicians willing to take positions in certain localities. An employer who is willing to wait several years to fill a physician-position because it cannot find willing U.S. applicants cries out as an exemplar of an employment situation that could be remedied through employment-based immigration. The fact that alien-immigrants may have to perform a residency prior to being licensed to practice should not be a ground for denial of labor certification in the absence of clear statutory or regulatory authority prohibiting it.

Here, as in the recently issued decision in Bronx Medical and Dental Clinic, 90-INA-479 (Oct. 30, 1992) (en banc), the interpretation of a labor certification regulation has proved to be extremely difficult. It may be suggested, therefore, that whenever the Secretary has an opportunity to reconsider the labor certification regulations the issues raised by these cases be addressed.

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<sup>2</sup>(...continued)

Officer had not raised section 656.20(c)(4) as a ground for denial of certification.